



November 6, 2001

Mr. David A. Anderson  
General Counsel  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2001-5129

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154444.

The Texas Education Agency (the "agency") received a written request for all "education records" pertaining to the requestor's son. You indicate that the agency has released some responsive information to the requestor. You contend, however, that other information responsive to the request is excepted from disclosure under sections 552.107(1) and 552.111 of the Government Code. This office has also received and reviewed comments from the requestor as to why the requested information should be released. *See Gov't Code § 552.304.*

We address first the requestor's contention that she has a special right of access to the information at issue pursuant to the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain numerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See 20 U.S.C. § 1232g(b)(1).* FERPA also provides to parents an affirmative right of access to their child's education records:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to *inspect and review* the education records of their children. . . .

Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

20 U.S.C. § 1232g(a)(1)(A) (emphasis added). "Education records" are those records, files, documents, and other materials which

- (i) contain information directly related to a *student*; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A) (emphasis added). A "student"

includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, *but does not include a person who has not been in attendance at such agency or institution.*

*Id.* § 1232g(a)(6) (emphasis added). Although the agency may be an "educational institution" for some purposes, it is not an institution attended by students. The records you seek to withhold were not transferred to the agency from another educational institution, but rather were created within the agency, and therefore are not "education records" as defined by FERPA. Consequently, the requestor does not have a special right of access to any of the submitted information under FERPA. Accordingly, we will address the applicability of the exceptions to required public disclosure that you raised.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either client confidences to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990).

Section 552.111 of the Government Code protects from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the policymaking process. Open Records Decision No. 615 at 5 (1993); *see also Austin v. City of San Antonio*, 630 S.W.2d 391 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5 (1993). Additionally, in Open Records Decision No. 559 (1990), this office held that a preliminary draft of a

document *that is intended for release in a final form* necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such may be withheld pursuant to the predecessor of section 552.111.<sup>1</sup>

After reviewing the information you seek to withhold, we agree that the information you have marked is excepted from public disclosure pursuant to sections 552.107(1) and 552.111 of the Government Code. The agency must release the remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

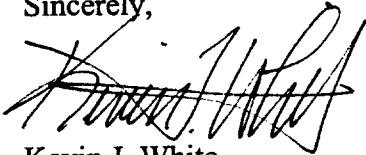
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<sup>1</sup>You state that all final versions of the draft documents you submitted to our office have been released to the requestor.

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. White", written over a horizontal line.

Kevin J. White  
Assistant Attorney General  
Open Records Division

KJW/RWP/sdk

Ref: ID# 154444

Enc. Submitted documents